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THE PARENT'S LIABILITY FOR NECESSARIES FURNISHED HIS MINOR CHILD.

Few topics in the law have been subject to so much loose thinking and obscure statement as the question of the extent of the parent's liability for necessaries furnished his child by a third person, and in none have the *dicta* of the courts been more rampant and misleading. Text-writers and judges have united in working needless confusion by bringing into the discussion of the common-law principles involved, the moral law, natural law and the civil law, and then confounding the mixture with the provisions of 43 Elizabeth and the equitable doctrine of maintenance out of the child's estate. Furthermore, the theme is one which, even in the leather-bound pages of the law, is apt to be "sicklied o'er" with pale sentiment, whether finding expression in the thin declamation of some later writers on Domestic Relations, or in the stately eloquence of Sir William Blackstone. The natural result of such methods of treatment is to be seen in the inconsistent and incoherent statements which are grouped under this heading in the text-books, encyclopedias and digests, and denominated law. The purpose of this paper is an attempt to free the subject from the encumbrance of irrelevant doctrines, and, by assimilating the cases, determine the common-law principles upon which the liability of the parent for necessaries furnished his child may properly be based.

First, it must be noted that the cases in which the liability of the parent is based upon contract made through the agency, express or implied, of the child, and those in which his liability arises out of a legal duty to support the child, are grounded upon wholly different principles. It is true the action is in assumpsit in each case, but in the first case the obligation is one intentionally and willingly assumed by the father, while in the second the obligation is imposed by the law quite against the will of the father. The wife, so long as she has not, by her own wrong, forfeited her right to claim support from her husband, is re-

garded as his agent by mere operation of law, and may bind him by her contracts for the purchase of necessaries, even though he expressly forbids such purchase.[1] But the authorities,[2] with little dissent,[3] deny that a similar agency exists by virtue of the relation of parent and child, and it should necessarily follow that the child cannot bind the parent in contract unless expressly or impliedly authorized to do so. While, on account of the relation between them, authority from the father to the child will be more readily implied than to a stranger, yet the real or apparent giving of authority is no less necessary to enable the child to bind the parent in contract. Different jurisdictions may differ as to the existence of a legal duty on the part of the parent to support the child, yet all must admit his liability upon his child-agent's contracts. Even the English cases, which vehemently deny the existence of the legal duty, go very far in accepting almost shadowy evidence to prove an agency.[4] Further, the legal duty, if it exists, extends only to the infant child, while the liability in contract may quite as well exist in the case of supplies furnished an adult child.[5] With this necessary and patent distinction between these two grounds of liability in mind, one is surprised to find such a statement as the following in *Porter* v. *Powell:*[6]

"Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to support their children during minority; that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed."

One can scarcely make an intelligent guess as to what is the principle upon which the above conclusions are based. The facts in the case were, that the seventeen-year-old daughter of the defendant, who had been for three years absent from her home, receiving and expending her own wages, fell sick, and procured the plaintiff to render her professional services. The defendant knew nothing of his daughter's

[1] Schouler, Dom. Rel., sec. 61; *Benjamin* v. *Dockham*, 134 Mass. 418.

[2] 2 Kent, Com., 192; Schouler, Dom. Rel., secs. 241, 266; *Shelton* v. *Springett*, 11 C. B. 452; Note 74 Am. Dec. 776; *Owen* v. *White*, 5 Port. 435, 30 Am. Dec. 572; *Hunt* v. *Thompson*, 3 Scam. 179, 36 Am. Dec. 538; *Gotts* v. *Clark*, 78 Ill. 230; *Tyler* v. *Arnold*, 47 Mich. 564; *Freeman* v. *Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399; *Kelly* v. *Davis*, 49 N. H. 176, 6 Am. Rep. 499; *Mortimore* v. *Wright*, 6 M. & W. 482; *Carney* v. *Barrett*, 4 Or. 171.

[3] See I Min. Inst. 407; 17 Am. & Eng. Enc. Law, 351.

[4] *Blackburn* v. *Mackey*, 1 C. & P. 1; *Cooper* v. *Phillips*, 4 C. & P. 581; *Shelton* v. *Springett* 11 C. B. 452; *Fowlkes* v. *Baker*, 29 Tex. 135.

[5] *Thayer* v. *White*, 12 Met. 343; *Townsend* v. *Burnham*, 33 N. H. 270.

[6] 79 Ia. 151; 18 Am. St. Rep. 353; 7 L. R. A. 176.

illness, or of the services rendered, until the plaintiff's demand for payment, which was refused. The only possible way to hold that any promise to pay was made by the father is to regard the daughter as his agent in the premises, by whose promise he was bound. But the facts wholly negative any sort of agency, there being present no element of previous knowledge or consent, or of subsequent ratification. Yet the court, after declaring that there rested upon the father a legal duty to supply the daughter with necessaries, which alone would have been amply sufficient to render him liable to one who had furnished such necessaries, proceeds to deny any such liability except in contract, and, for lack of such contract, forthwith creates one out of the discarded legal and moral duty.

Similarly confusing statements of the law, growing out of a failure to discriminate clearly between the parent's liability arising out of contract and that based on his legal duty to support, are frequently seen in both texts and reports. Thus Schouler, in his work on Domestic Relations, section 241, writes:

"There can be no doubt that a parent is under a natural obligation to provide necessaries for his minor children. But how that obligation is to be enforced is not so clear. . . . . In fine, either an express promise, or circumstances from which a promise by the father can be inferred, is essential."

I. LIABILITY IN CONTRACT.

It now becomes important to determine when the law implies authority on the part of the child to bind the parent in contract. For if the agency be once established, the father is obliged to pay for articles purchased by the child, whether they be necessaries or not,[1] and whether the child be infant or adult. Further, if the child have authority to make the contract of purchase, the parent is liable, in the absence of fraud or imposition, for the contract price, and not merely for what the supplies are reasonably worth, as would be the case if the infant bought on his own credit, or if the supplies were furnished the infant without contract. In case of liability in contract for supplies furnished the child, the widowed mother would be equally liable with the father,[2] and under the present Virginia statute (Acts 1899–1900, p. 1240) even during coverture, if she had given the child authority, express or implied, to make the purchase.

There is some authority for holding that the child is the parent's

[1] *Thayer* v. *White*, 12 Met. 343; *Harper* v. *Lemon*, 38 Ga. 227.

[2] *Girls' Industrial Home* v. *Fritchey*, 10 Mo. App. 344.

agent for the purchase of necessaries by virtue of the mere relation existing between them, as in the case of husband and wife, that the law will "imply" the agency from the legal duty[1] to support the child. Some courts even have held that a moral duty[2] to support is sufficient to raise the contract of agency, irrespective of the consent of the parent. But the great weight of authority,[3] and the better reason, repudiate this doctrine of imputed agency, and apply the general rule making the father liable in contract only when he has previously assented to or subsequently ratified the purchase made by the child. But this assent may be either express or implied ; and from the intimate relation of parent and child, and the custom of parents to supply their infant offspring with necessaries, the law will much more readily imply the parent's willingness to be bound by the child's contract for the purchase of necessaries than if the parties were strangers, or the articles supplied not necessaries.[4] Therefore, very slight evidence will be sufficient to establish such an agency and imply a promise on the part of the parent to pay for the necessaries supplied.[5] Thus knowledge, without dissent, that the child has made a purchase, will be evidence of a ratification of the contract by the parent.[6] So if the parent has formerly paid for goods purchased on credit by his child, and does not forbid such sales, it will be inferred that the parent authorizes further purchases on credit.[7] And where the father has ratified the former contracts of his child buying goods on credit by paying money due under them, he will be liable, it is held, for subsequent purchases made by the child, even though he forbids his child to contract further debts, and even though he is given in charge to a friend, who is supplied with all moneys needful to procure necessaries for the child, provided the person furnishing the supplies acts in good faith and without a knowledge of the provision made by the father.[8] Mere silence[9] on the part of the parent may imply authority given. Thus, where the plaintiff by letter informed the defendant that goods had been sold to his son, it was held that the father's failure to answer

[1] *Tompkins* v. *Tompkins*, 11 N. J. Eq. 512; *Allen* v. *Jacobi*, 14 Ill. App. 277.

[2] *Porter* v. *Powell*, 79 Ia. 151, 7 L. R. A. 176.

[3] See note 2, *supra*

[4] *Crane* v. *Baudouine*, 55 N. Y. 256, *Mills* v. *Wyman*, 3 Pick. 207.

[5] Parsons, Cont. 302.

[6] *Fowlkes* v. *Baker*, 29 Tex. 135.

[7] *Fowlkes* v. *Baker*, *supra*; *Plotts* v. *Rosebury*, 28 N. J. L. 146.

[8] *Bryan* v. *Jackson*, 4 Conn. 288.

[9] *P. W. & B. R. Co.* v. *Cowell*, 28 Pa. St. 329.

the letter was evidence of an intent to ratify the purchase.[1] So, if authority to purchase is clearly proved, the parent will be liable for goods furnished the child, even when such goods are not necessaries.[2] In the English case of *Law* v. *Wilkin*,[3] the Court of Kings Bench held that when a son away from home at school had, without the knowledge of his father, bought clothes, of which he stood in need, and had taken these clothes with him when he went home, although it did not appear that the father had ever seen them, the question of authority to the child to make the purchase should have been left to the jury, and that a non-suit was erroneous. A similar ruling was made in *Blackburn* v. *Mackey*.[4] But in the later case of *Mortimore* v. *Wright*,[5] Lord Abinger declared these cases were not law, and stated broadly that the father could not be held liable for the debts of his infant son unless he had done some specific act from which it could be inferred that he had authorized the purchase.

But the father cannot be held liable upon the contract of the child when the goods furnished are charged to the child[6] and not to the father; nor when the son is absent from home and supplied by the father with necessaries, or money to purchase necessaries, unless the father has paid bills previously made, or otherwise indicated his willingness that the son should use his credit.[7] Neither can the father be charged with debts incurred by his son who lives away from his father's home, conducting his own affairs and retaining his own earnings, even when the father has requested that credit be given his son,[8] and certainly when the son leaves home for the purpose of escaping domestic discipline, or for other improper cause, he does not take with him authority to pledge the father's credit.[9]

Thus, while some of the courts seem to hold that an agency for the purchase of necessaries by the child will be implied from the mere existence of the relation of parent and child, it may be seen that the better considered authorities hold that the father is liable for debts incurred in the purchase of necessaries by the child only when the supplies

[1] *Thayer* v. *White*, 12 Met. 343; *Deane* v. *Annis*, 14 Me. 26.

[2] *Harper* v. *Lemon*, 38 Ga. 227.

[3] 6 Ad. & El. 718.

[4] 1 C. & P. 1.

[5] 6 M. & W. 718.

[6] *Gordon* v. *Potter*, 17 Vt. 348; *Bartels* v. *Moore*, 9 Daly, 235.

[7] *Owen* v. *White*, 5 Port. 435.

[8] *Bushnell* v. *Bishop Hill Colony*, 28 Ill. 204. Such promise would be within the statute of frauds. *Dexter* v. *Blanchard*, 11 Allen, 365.

[9] *Angell* v. *McLellan*, 16 Mass. 288; 8 Am. Dec. 118.

are furnished on behalf of the father, and when authority to the son can be inferred from all the circumstances attending the transaction. And among the facts to be considered in drawing such inference are the relationship of the parties and the fact that parents usually supply or intend to supply their infant offspring with the necessaries of life.

II. LIABILITY ARISING FROM DUTY.

However difficult its application to the individual cases that may arise, the principle of the parent's liability in contract for the necessaries furnished his child is plain and simple. But this is far from being the case with regard to the liability arising from the mere duty resting on the parent to support the child. Granting that such a duty of maintenance exists, it is exceedingly difficult to determine upon what legal basis it should be made to rest. In his effort to fix such a basis, one is little aided by the cases, confused as they are as to principles involved and rendered painfully uncertain by the rank growth of *dicta*, which seem to spring up in unusual luxuriance from the rich soil of sentiment and humanitarianism which surrounds such questions in a peculiar degree. *Dictum*, always sufficiently dangerous, is rendered peculiarly so in these cases involving the maintenance of children, by reason of the statute of 43 Elizabeth, Ch. 2, in England, and statutes of similar import in the various States of the American Union, which often come into the judge's mind when they do not properly come into the case. But before attempting to formulate any statement of law as to when the parent is thus liable for necessaries furnished the child, it will be necessary first to determine, as well as may be, what the cases have decided as to the nature and extent of the parent's duty to maintain the child.

1. *The English doctrine.*— In view of Section 2, of the Code of Virginia, declaring the common law of England to be the law of this State, we naturally look to the English cases as affording the most satisfactory means of determining what is the common law in regard to the question under discussion. To quote the characteristic words of Mr. Bishop:[1] "The habit of the judicial mind in this country is always to inquire what is the present English doctrine upon every question presented to it—not that the doctrine is always followed, but there is always a certain satisfaction in knowing what it is."

But unfortunately the English cases afford us little aid or comfort in the present matter. Until long after the time when English decis-

[1] 1 Bishop on the Law of Married Women, sec. 848.

ions ceased to be binding as precedents upon American courts, the doctrine of parental liability for necessaries furnished the child was in more hopeless confusion in Westminster Hall than at present in the various American courts. Blackstone[1] speaks of the parent's duty of maintenance as plain both in morals and in law, but it is clear that he had in mind the statutory provisions of 43 Eliz. Several early cases[2] intimate, entirely aside from the point up for decision, that the parent is under a legal obligation to support his child; and as late as 1827 Lord Tenterden, in *Nichols* v. *Allen*,[3] said: "There is not only a moral but a legal obligation on the defendant to maintain his child." In that case the father was held liable on an implied contract to pay to the plaintiff who had supported his illegitimate child the sum he had been accustomed to pay for the same purpose during previous years. The statement quoted was therefore purely *obiter*, but the fact that so great a judge as Lord Tenterden should give forth such a *dictum* is sufficient evidence of the uncertainty of the law at that time. This confusion seems to have continued until 1840 when the case of *Mortimore* v. *Wright*[4] came before the Court of Exchequer for decision. Here the son of the defendant in his twentieth year had left home, whether with or without the consent of his father does not appear, and was working on his own account and receiving his own wages. For many months he paid the plaintiff for board and lodging out of his own money. Some six months before attaining his majority the boy fell ill and was unable to pay for the care and necessary supplies with which the plaintiff still continued to furnish him. For the value of these necessaries the plaintiff sought to hold the father liable. The lower court gave judgment for the plaintiff upon a finding by the jury that the defendant had authorized the son to incur the debt. On appeal the Exchequer court might easily have contented itself with making absolute the rule to enter a nonsuit, on the ground that there was no evidence to go to the jury on the point of authority, but Lord Abinger thought fit to go quite out of his way to say: "I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle,

[1] 1 Blackstone, Com. 447.

[2] *Simpson* v. *Robertson*, 1 Esp. 17; *Crantz* v. *Gill*, 2 Esp. 471. See also *Urmston* v. *Newcomen*, 4 Ad. & El. 899.

[3] 3 C. & P. 36.

[4] 6 M. & W. 482

or a mere stranger would be." This language is certainly as positive as a judge could make it, but it would have more convincing force if it had been necessary to the decision. It seems that the facts in the case clearly show that the son was emancipated, and it is scarcely probable that many of the American courts would hold the father liable under similar circumstances.[1]

In *Bazeley* v. *Forder*,[2] Cockburn, C. J., said in a dissenting opinion: "It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." The majority of the court, however, decided that the father was liable for necessaries furnished his son at the order of the mother, who was living rightfully apart from her husband, with the child in her custody by order of court. This decision was based upon an implied authority in the wife to bind the husband for such supplies as were necessary to her comfortable existence, among which was a reasonable provision for the child in her keeping. If the same case should come up in an American court it would be decided in precisely the same way.[3] From these and numerous other English cases[4] of similar import which cannot be here set forth it is seen that, while it may be regarded as settled law in England that the parent is not liable for necessaries furnished his minor child, it is settled in a most unsatisfactory way, being the result of a procession of aggressive *dicta* rather than of a series of reasoned decisions. We must further note that the English doctrine has been powerfully influenced by the provisions of 43 Elizabeth, which were constantly in the minds of the judges as supplementing, in effect, the deficiencies of the harsh rules laid down by them as the common law. This famous statute, which was old enough to be a part of the common law of Virginia until abolished by the Act of 1792, has been substantially enacted in many of the States of the American Union but not in Virginia. As originally adopted, it read as follows:

[1] *Varney* v. *Young*, 11 Vt. 258; *Gotts* v. *Clark*, 78 Ill. 229. But see *Porter* v. *Powell*, 79 Iowa 151, 7 L. R. A. 176.

[2] 3 Q. B. 559 (1868).

[3] *McMillen* v. *Lee*, 78 Ill. 443; *Rumney* v. *Keyes*, 7 N. H. 571.

[4] *Baker* v. *Keen*, 2 Stark. 501; *Flack* v. *Tallemache*, 1 C. & P. 5; *Blackburn* v. *Mackey*, 1 C. & P. 1; *Rolfe* v. *Abbott*, 6 C. & P. 286; *Clements* v. *Williams*, 8 C. & P. 58; *Seaborne* v. *Maddy*, 9 C. & P. 497; *Shelton* v. *Springett*, 11 C. B. 452, Pars. Cont. 300. See Chitty's note 1 Blackstone's Comm. 448.

"And be it further enacted, that the father and grandfather, and the mother and grandmother, and the children, of everie poore olde blinde lame and impotente person, or other poore person not able to worke, beinge of a sufficient abilitie, shall at their owne chardges releive and maintaine everie suche poore person, in that manner and accordinge to that rate, as by the justices of the peace of that countie, where suche sufficient persons dwell, or the greater number of them, at their generall quarter sessions shall be assessed; upon paine that everie one of them shall forfeite twentie shillings for everie monethe which they shall faile therein."

It is easily seen that this statute was enacted for the benefit of the public, to prevent its being required to support such paupers as had near lineal relatives able to maintain them. In other words, it is but a part of the general poor law, and in no sense declaratory of a principle of common law requiring the parent to support his child. It can be invoked only in aid of the public, and never for the benefit of the child.[1] Finally we may note the following peculiarities of the English doctrine that the parent owes the child no legal duty of support·

(1) It is a doctrine announced by the English judges, and n properly derived from the decisions of the English courts.

(2) It cannot be regarded as fixing the common law in Virginia, as it was itself unsettled prior to 1840.

(3) It has a strange companion in the criminal law. A father is criminally liable for neglecting to support his child,[2] yet it is difficult to understand how one can be punished for a failure to do what he is under no legal obligation to do.

2. *Doctrine in the United States generally.*—Although the American decisions are not less embarrassingly rich in *obiter dictum* than the English, and despite the great apparent conflict in the holdings of our numerous courts of last resort, yet it may be safely said that according to the American authorities[3] a father is under a legal obligation to maintain his minor child irrespective of statute. This is strenuously denied in many cases[4] which profess to follow the English authorities, but, as is well shown in Prof. Lile's Notes to 1 Minor's Institutes,

[1] See *Rawlins* v. *Goldfrap*, 5 Ves. Jr. 440. *In re Ryder*, 11 Paige, 185; 2 Kent, Com. 191.

[2] Clark, Crim. Law, 177; *Rex* v. *Friend*, Russ. & R. 20.

[3] 2 Kent, Com. 191; Parsons, Cont. 303; 1 Min. Inst. 407; Schouler, Dom. Rel. sec. 237; Tiffany, Dom. Rel. 233; 17 Am. & Eng. Enc. of Law, 351; *Porter* v. *Powell*, 79 Iowa, 151, and note, 7 L. R. A. 176; *Owen* v. *White*, 5 Port. 435; *Van Valkinburgh* v. *Watson*, 13 Johnson, 480; *In Re Ryder*, 11 Paige, 185; *Dennis* v. *Clark*, 2 Cush. 352; *Gilley* v. *Gilley*, 79 Me. 292.

[4] *Gordon* v. *Potter*, 17 Vt. 443 (goods sold on infant's credit); *Raymond* v *Loyl*, 10 Barb. 483 (son had left home without mother's consent); *Freeman* v. *Robinson*, 38 N. J. L. 383 (articles not necessaries); *Kelly* v. *Davis*, 49 N. H. 176 (son absent from home receiving his own wages). For other cases see Lile's Notes to 1 Min. Inst. pp. 235-243.

p. 240, these statements denying the legal duty of support on the part of the father, in the sweeping form they sometimes assume, were unnecessary in the decisions of the cases, which, on the facts, are in each case found not inconsistent with the general doctrine above stated. That such a legal duty of support is recognized in the United States cannot well be called in question in view of the great mass of authority, both of reported decisions and legal treatises that so state the law. Yet it is exceedingly difficult to find a single case in which the father has been flatly and pointedly held liable to pay for necessaries furnished his minor child by reason of his mere duty to maintain such child. So averse do the courts seem to enforcing the bare legal obligation that they base their decisions upon implied contract in cases in which no contract could possibly be implied from the facts, sometimes assuming the remarkable attitude of denying the existence of the obligation apart from a promise to pay, and then implying the promise from the obligation to pay.[1] Yet in deciding that when a divorced wife is awarded custody of the children, the husband may be required to make suitable provision for both wife and children, [2] or that a father cannot subject the estate of his infant child to reimburse him for expenses incurred in the maintenance and education [3] of the child, the courts have taken needless pains to announce that the father is legally bound to support his child. From an examination of the cases containing these announcements, we perceive the anomalous spectacle of the English and American courts deciding cases presenting similar facts in practically the same way, but the former taking occasion to declare that the father is not obliged in law to support his child, and the latter asserting that such maintenance is a plain legal duty.

But it will be observed that while the American cases declare the father liable for necessaries furnished his minor child, yet they narrowly limit this liability so as in no way to deprive the father of his right to control his own children and to determine what supplies shall be furnished them. In fact, it is believed that this liability exists only in three cases. See Lile's Notes to 1 Minor's Inst. 242.

(1) When the child lives with the father, a stranger furnishing him with necessaries can charge the father with payment for them only when the father has been guilty of a clear and palpable omission to

[1] *Porter* v. *Powell*, *supra*.

[2] *Gilley* v. *Gilley*, 79 Me. 292, *Pretzinger* v. *Pretzinger*; 45 Ohio St. 452; *Stanton* v. *Wilson*, 3 Day, 37.

[3] *Evans* v. *Pearce*. 15 Gratt. 513; *Richardson* v. *Overleese* (Tex.), 44 S. W. 308.

make such provision for his child as may be necessary to preserve the child's life and health.[1] In such a case the word necessaries has not the same meaning as in the ordinary case of infants' contracts, but includes only such articles as may keep the child from actual want and suffering.[2]

(2) When the child is absent from home, having been driven therefrom by the wrong of the father, the latter has deprived himself of the right to determine what articles shall be supplied to his child, and he will therefore be required to compensate any stranger who furnishes the child with the necessaries that should have come from the father's hands.[3] And it seems that the scope of the word "necessaries" should be broader in this case than when the child lives with his father.[4] But if the child has left home of his own wrong,[5] through impatience of parental control, or to escape the consequences of a wrongful act, he has forfeited his right to receive support, and a stranger supplying him with necessaries must either look to the infant or rejoice in his own charity.

(3) When the child is absent from home by the command of the father, if the father has neglected to make provision for the child's wants, a third person supplying such wants may recover from the father the reasonable value of the articles furnished.[6] But if the child has been emancipated from parental control, and receives his own wages,[7] or if he is absent, though with the consent of his father, upon business of his own,[8] it seems that a stranger affording him support can make no claim against the father.

It would seem reasonable that when the father sends his child away from home without making provision for supplying his needs while absent, he, by implication, authorizes the child to purchase such articles as might prove necessary to him, according to the circumstances. From that point of view the person furnishing the necessaries might

[1] *Owen* v. *White*, 5 Port. 435; *Rogers* v. *Turner*, 59 Mo. 116; *Van Valkinburgh* v. *Watson*, 13 Johns. 480.

[2] Parsons, Cont. 305; 1 Minor's Inst. 407; *Hunt* v. *Thompson*, 3 Scam. 179; *Tyler* v. *Arnold*, 47 Mich. 564; *Farmington* v. *Jones*, 36 N. H. 271.

[3] *Owen* v. *White*, 5 Port. 435; *Weeks* v. *Morrow*, 40 Me. 151.

[4] *Stanton* v. *Wilson*, 3 Day, 37.

[5] *Raymond* v. *Loyl*, 10 Barb. 483; *Angel* v. *McLellan*, 16 Mass. 28.

[6] *Owen* v. *White*, *supra*; *Parker* v. *Tellinghast*, 19 Abb., N. C. 190.

[7] *Varney* v. *Young*, 11 Vt. 258; *Gotts* v. *Clark*, 78 Ill. 229. Cf. *Mortimore* v. *Wright*, 6 M. & W. 482, and dissenting opinion of Buck, J., in *Porter* v. *Powell*, 79 Iowa, 151.

[8] *Hunt* v. *Thompson*, 3 Scam. 179, 36 Am. Dec. 538.

charge the father in contract, rather than on the ground of mere legal duty, and it has been so held.[1] Such holding would reduce the cases in which a father is liable, by reason of mere duty, to a third person for necessaries furnished his child to two only, as first set out above.

It is often stated, even in those jurisdictions in which the legal duty of support on the part of the father is recognized, that no such duty rests upon the mother.[2] This is clearly true during the life of the father, but doubtful when the mother is a widow, entrusted with the custody of her children, and having ability to support them. Granted her ability, there seems to be no valid reason why the widowed mother should not be equally liable with the father, and such seems to be the prevailing rule.[3]

3. *The doctrine in Virginia.*—The question of parental liability for necessaries furnished a minor child has never come before the Virginia Court of Appeals, but from the consistent and positive character of the *dicta* to be found in numerous Virginia cases it is probable that the general American doctrine will be adhered to in this State, although some doubt is cast upon this conclusion by the contrary opinion of the learned author of Tucker's Blackstone.[4] Judge Tucker's opinion, however, was formed upon the assumption that the settled rule of the English common law denied such liability on the part of the father, which, as has been shown, was inaccurate. Judge Green also seems to have had some doubt as to the law on this point, for we find him saying, in *Myers* v. *Wade*:[5] "For there is a natural, if not a legal, obligation on all parents to support their children, if of ability to do so."

But, in *Evans* v. *Pearce*,[6] Robertson, J., says: "A father, if of ability, is bound to maintain his infant children, even though they may have property of their own." This statement is positive enough, but unfortunately it was unnecessary under the facts of the case. The sole question to be decided was whether the estate of a deceased father should be allowed credit for the support and education of his children out of the income of their property. The court very properly held

[1] *Shelton* v. *Springett*, 11 C. B. 452; *Owen* v. *White*, *supra*.

[2] 1 Minor's Inst. 407; *Fairmount etc. Ry. Co.* v. *Stutler*, 54 Pa. St. 375.

[3] 17 Am. & Eng. Enc. of Law, 354; *Girls' Industrial Home* v. *Fritchey*, 10 Mo. App. 344. See article by F. W. Morton, 4 Va. Law Reg. 81.

[4] Vol. I., p. 126.

[5] 6 Rand. 444, 448.

[6] 15 Gratt. 513.

that no such allowance could be made without the clearest proof that justice requires it. This decision is in strict accord with the settled rule both in this country and in England,[1] that no allowance out of the child's estate will be made to the father of adequate means for expenses incurred for the support and education of the child. The doctrine does not rest upon the father's legal duty to maintain the child, which, as we have seen, is expressly denied in England, but rather on the well-established fact that fathers usually support and educate their children without any expectation of reimbursement. Therefore, if the father expects compensation from his child's estate for money expended in his support and education he must make his desire known to the court, and first secure an order authorizing such an application of the child's property. That the father's legal duty of support was not properly involved in the decision of *Evans* v. *Pearce* may further be seen from the fact that no allowance was made for the education of the children, and if the *dictum* quoted above had been the ground of decision we might have expected a statement that a legal duty to educate his child rests upon the parent. Yet no courts have yet gone so far. Furthermore, it has been held that a stepfather, standing in *loco parentis* to a child, cannot receive credit for support and education from the estate of the child, though it is well settled that a stepfather owes no duty of support to his stepchild. But this *dictum* in *Evans* v. *Pearce* has been re-echoed in numerous subsequent Virginia cases,[2] and with unquestioning approval. In the recent case of *Owens* v. *Owens*,[3] in affirming an award of alimony to a divorced wife retaining custody of her children, the court announced that the father was "under a legal obligation to support his wife and children." An English court would readily have granted such an award, though it is improbable it would have made the remark quoted.

But however little binding force such *dicta* may possess, they indicate clearly what is the opinion of the bench, and there can be little doubt that when the case fairly arises it will be decided that a stranger furnishing a minor child with necessaries may charge the father with the value of them, in accordance with the general American rule stated above.

[1] See 1 Minor's Inst. 409; Schouler, Dom. Rel., sec. 238. Such allowance, without previous decree authorizing expenditure, will be made if deemed "proper under all the circumstances."

[2] *Griffith* v. *Bird*, 22 Gratt. 73; *Hauser* v. *King*, 76 Va. 731; *Stigler* v. *Stigler*, 77 Va. 168.

[3] 96 Va. 191.

III. SUMMARY.

By way of summary, the conclusions reached may be stated as follows:

1. The obligation on the part of the parent to pay for necessaries furnished his minor child may have its origin in contract or in legal duty.

2. The liability in contract is distinct in nature and extent from that arising from legal duty.

3. The liability in contract exists only when the parent has expressly, or by implication, conferred authority upon the child to bind him in contract, and such authority will not be implied from the mere relation of parent and child or from any duty, moral or legal, arising therefrom.

4. The English courts recognize no liability on the part of the father save in contract.

5. The American courts generally, in addition to the liability in contract, enforce an obligation to support arising from the mere relation of the parent to the child, provided always that the right of the parent to control his children and regulate his household is not impaired thereby.

6. While the question has not been decided in Virginia, there can be little doubt but that when it does arise it will be decided in accordance with the general American rule.

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THE ESSENTIALS OF A VALID MARRIAGE IN VIRGINIA.

[Concluded.]

(x) *Mississippi.*—A number of cases are cited from this State as holding that a common-law marriage is good, notwithstanding the statute may not be complied with[1]. By the revised Code of Mississippi (1892), however, after stating that a license shall be necessary, it is added, "And such license *shall be essential* to its validity."

(y) *Pennsylvania.*—In this State it is well settled that a common-law marriage is to be sustained. The first judicial language that we

[1] *Hargroves* v. *Thompson*, 31 Miss. 211; *Dickerson* v. *Brown*, 49 Miss. 357; *Rundle* v. *Pegram*, 49 Miss. 751; and *Floyd* v. *Calvett*, 53 Miss. 37.